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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

DEMETROIS DIXSON,

Defendant and Appellant.

A123884

**(Alameda County
Super. Ct. No. C150971)**

A jury convicted appellant Demetris Dixon of multiple felonies, including: (1) forcible rape (Pen. Code, § 261, subd. (a)(2));¹ (2) unlawful sexual intercourse with a minor (§ 261.5, subd. (c)); (3) battery with serious bodily injury (§ 243, subd. (d)); (4) corporal injury to a cohabitant (§ 273.5, subd. (a)); (5) forcible sodomy (§ 286, subd. (c)(2)); and (6) forcible oral copulation (§ 288a, subd. (c)(2)). The trial court granted appellant a new trial on one of the forcible rape counts and sentenced him to prison for an aggregate term of 27 years and 4 months on the remaining counts.

Appellant appealed. In an unpublished decision, this court concluded the imposition of the upper term for one of the counts of corporal injury to a cohabitant (count 4) violated appellant's right to a jury trial under *Cunningham v. California* (2007) 549 U.S. 270. (*People v. Dixon* (Apr. 22, 2008, A113637) [nonpub. opn.]) This court

¹ Unless otherwise noted, all further statutory references are to the Penal Code.

remanded the case for resentencing in accordance with *People v. Sandoval* (2007) 41 Cal.4th 825 but otherwise affirmed the judgment.

At the outset of the resentencing hearing on remand, appellant made a motion pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 to discharge his court-appointed counsel. Following a hearing, the court denied the motion.

Appellant also filed numerous motions in propria persona, including: (1) “Motion for Evidentiary and Appointment of Counsel Hearing Surrounding the Un-presented Facts Surrounding the Aggravation Factors/Motion and Authorities in Support of Motions and Appointment of Counsel;” (2) “Motion for Re-Sentencing in Connection with Remand and Attorney’s Failure to Address the Issue in Connection with Marsden Motion for Relief;” (3) “Motion for Re-Sentencing;” (4) “Motion to Amend New and Un-presented Facts that Support [C]hange of Probation Officer’s Report and Recommendation Affecting Rule 4.413, 4.414, 4.423, Sections 1204.4.(b), 1202.45m [], Section 1203.1(b), Section 1465.8;” (5) “Request for Appointment of [C]ounsel to [I]nvestigate and [P]repare [M]otion for DNA;” and (6) “Newly Discovered Evidence Having to do with the Motel Receipt Rendered on March 23[].” Following a hearing, the court denied all of these motions. Appellant then made a second *Marsden* motion. The court conducted a hearing on the *Marsden* motion and denied it.

The court then addressed the issue of appellant’s sentence on count 4. The prosecutor urged the court to resentence appellant to the upper term pursuant to *Sandoval*.² As the prosecutor explained, “Under *Sandoval*[,] I think the court has a

² In *Sandoval*, the California Supreme Court held “that a defendant who has established prejudicial Sixth Amendment error under *Cunningham*, *supra*, 549 U.S. 270, [], is entitled to be resentenced under a scheme in which the trial court has full discretion to impose the upper, middle, or lower term, unconstrained by the requirement that the upper term may not be imposed unless an aggravating circumstance is established.” (*People v. French* (2008) 43 Cal.4th 36, 45, citing *Sandoval*, *supra*, 41 Cal.App.4th at pp. 845-852.) Pursuant to *Sandoval*, “if a defendant is successful in establishing *Cunningham* error on appeal, the trial court is not precluded from imposing the upper term upon remand for resentencing. The defendant is entitled only to be resentenced under a constitutional scheme and is afforded the opportunity to attempt to persuade the

discretion to sentence [appellant] to either the mid-term or the aggravated term. So long as [the court] states a reason, the court does not have to state a factual basis for that reason. . . .” The prosecutor continued, “I think that the court exercised a great deal of discretion the last time it sentenced [appellant] and was extremely thoughtful about the original sentence. I think the court’s original sentence was appropriate under the circumstances. . . .”

Counsel for appellant asked the court to sentence appellant to the midterm and urged the court to consider various mitigating factors, specifically that appellant had “virtually no prior criminal history.” In response, the court noted it had “considered numerous things” — including appellant’s criminal record and circumstances in mitigation — at the prior sentencing hearing. The court stated it was “deeply impressed” by the trial testimony given by appellant’s victims which established they were “the victims of horrendous criminal conduct[.]” It also explained it had been “very fair in the way” in the way it sentenced appellant the first time and that it “intend[ed] to do it the same way” on remand. The court then sentenced appellant to the upper term of four years on count 4.

We appointed counsel to represent appellant on appeal. Counsel presents no argument for reversal, but asks this court to conduct an independent review of the record in accordance with *People v. Wende* (1979) 25 Cal.3d 436, 441-442. Appellant filed a supplemental brief raising an ineffective assistance of counsel claim. Appellant contends his trial counsel rendered ineffective assistance by failing to adequately investigate. According to appellant, had counsel performed an adequate investigation, counsel would have discovered a motel receipt dated March 23, 2005 which apparently demonstrated appellant was innocent of some of the charges. Appellant’s ineffective assistance of counsel claim is not cognizable on appeal. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

The judgment is affirmed.

trial court to exercise its discretion to impose a lesser sentence.” (*French, supra*, 43 Cal.4th at pp. 45-46.)

Jones, P.J.

We concur:

Simons, J.

Bruiniers, J.*

*Judge of the Superior Court of Contra Costa County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.